

MEMORANDUM

State of Alaska
Department of Law

TO: Designated Ethics Supervisor

DATE: June 25, 1999

FILE NO: 663-99-0263

TEL. NO: 465-3600

SUBJECT: Service Given to Political
Action Committees

FROM: James L. Baldwin
Assistant Attorney General
Governmental Affairs Section

You have requested our advice on whether an employee of an agency may be an "ex officio" member of a political action committee ("PAC") that will be engaged in campaign activities in support of the ballot proposition seeking advice on use of permanent fund earnings for state government operations. This memorandum addresses the application of the Alaska Executive Branch Ethics Act (AS 39.52)(the Ethics Act) to the facts presented.

The answer to your question depends on two factors: first, whether the employee would be expected carry out his or her responsibilities while on official duty using state property or other public resources; and, second, whether the service to the PAC board is compatible or in conflict with the discharge of official duties.

I. MISUSE OF OFFICIAL POSITION

It is a misuse of official position under AS 39.52.120 for a public officer or employee to use state funds, facilities, equipment, services, or another government asset or resource for a partisan political purpose.¹ The term "partisan political purpose" is defined as having the intent to differentially benefit a group. AS 39.52.120(b)(6)(B). Under the statutes applicable to APOC, a "group" would include a political action committee formed with the principal purpose of influencing the outcome of an election. AS 15.13.400(5)(B). A public officer or employee engaged in campaign activity that involves something other than minor, inconsequential, and unavoidable activity must be on approved leave for the period of campaigning if the activity is considered to occur on "government time." AS 39.52.120(d). The period considered to be government time is determined according to the work schedule set for the position by the immediate supervisor.

¹ There are limited exceptions for use of the governor's residence and communications equipment for political strategy meetings. AS 37.52.120(b)(6).

In keeping with advice given prior to the 1998 election campaign, we believe that the employee must be on official leave while engaged in a partisan political campaign conducted by a PAC. It would not be appropriate for the employee to be an "ex officio" member of the PAC. The designation "ex officio" connotes a status related to the employee's official position in the state government.

II. OUTSIDE SERVICE

Another statute in the Ethics Act applies to so-called "outside employment." *See AS 37.52.170.* Upon first impression it would not seem that membership in a political action committee would be considered outside employment. However, the wording of the statute appears to be broad enough to cover professional advice given to the board of directors of a PAC formed as a non-profit corporation. The statute provides that a public employee may not "render services to benefit a personal or financial interest...outside the agency which the employee serves, if the outside...service is incompatible or in conflict with the proper discharge of official duties. A personal interest includes involvement in a political organization for which the person or organization receives a benefit." AS 39.52.960(18).

The regulations interpreting the Ethics Act provide the following guidance as to the incompatibility-or-in-conflict standard:

For purposes of AS 39.52.170, a public employee's outside employment or service, including volunteer service, is incompatible or in conflict with the proper discharge of official duties if the employee's designated supervisor reasonably determines that the outside employment or service

- (1) takes time away from the employee's official duties;
- (2) limits the scope of the employee's official duties; or
- (3) is otherwise incompatible or in conflict with the proper discharge of the employee's official duties.

9 AAC 52.090. All of these factors are highly dependent on the specific fact situation and ultimately require the designated supervisor to apply judgment in determining whether the outside employment or service would have any of the prohibited results.

The question of taking time away from assigned duties is self-explanatory. In earlier advice given by this office we advised that

If [the employee] only does the proposed five to ten hours of work outside of his normal working hours for the state, it would appear reasonable to conclude that the outside employment is not interfering with his state duties.

1995 Inf. Op. Att'y Gen. at 6 (July 14; 661-95-0777, 661-95-0817). In another memorandum of advice, this office advised: "We believe that 30 hours of outside work, in addition to 37.5 hours as a state employee per week, may be deemed excessive." 1989 Inf. Op. Att'y Gen. at 4 n.3 (Aug 7; 663-89-0588). According to information you provided, it is expected that the employee will spend no more than one to five hours per week in attending meetings of the PAC. It appears that this time commitment would not cause incompatibility.

On the issue of the outside service limiting the scope of the employee's official duties, it is difficult to determine the effect of engaging in a partisan effort on an exempt position. There is a tension between the right of a state employee to engage in political activity while off-duty and the need to have employees who can perform the full scope of services intended for their position. In the case of employees of the division of elections, it is readily apparent why partisan political activity would tend to limit the scope of official duties and would therefore be considered incompatible. This employee is in the exempt service and has no connection with the conduct of elections. The employee serves at the pleasure of the appointing authority. We have not been presented with any facts that would support a finding that the issue-oriented political activity involved here would conflict with the employee's official duties. If additional facts bear on this point, you should make them known to us and we will advise you accordingly.

The residual category of "incompatible or in conflict with the proper discharge" is broad and could be implicated in a number of situations. The Ethics Act does not apply in instances of alleged conflicts of "insignificant or conjectural effect." AS 39.52.110(b). In this instance the employee merely attends meetings of the board of directors of the PAC. The employee is not carrying out a commercial activity while engaging in PAC activities, nor could the employee be acting in any official capacity. It is believed that on this basis any apparent conflict with official duties would be insignificant or conjectural. Further, we believe that a limitation on this activity might well implicate First Amendment rights of political association without a corresponding state interest that needs protection.

Based on the facts available to us, it does not appear that involvement in the campaign activities of the PAC would constitute incompatible outside service under the Ethics Act.

JLB:jn